



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 27, 1994

Ms. Gretchen Kuehn Bohnert
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR94-039

Dear Ms. Bohnert:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code, formerly V.T.C.S. article 6252-17a. Your request was assigned ID# 22020.

The City of Houston (the "city") received a request for the following information about its employee drug testing program:

1. Any and all reports detailing or describing the progress of the drug testing program of the City of Houston.
2. Any and all documents or electronic data that would show, but not necessarily be limited to, a monthly statistical breakdown of results (i.e., confirmed positive or negative), by city department or city contractor, gender and race, stemming from the following:
 - a. Reasonable suspicion testing
 - b. Post accident testing
 - c. Optional steroid testing
 - d. Follow-up testing
 - e. Applicant testing
 - f. Random drug testing
 - g. Assignment testing
 - h. Contractor testing

3. Any and all documents or electronic data that would show, but not necessarily be limited to, a monthly statistical breakdown of positive drug test results, by city department or city contractor, gender, race and drug type . . . reflecting precisely what action has been taken following a positive result stemming from the programs listed above in 2(a)-2(h). This could include, but not necessarily be limited to, termination of employment or contractor status, referral to EAP, disciplinary action or other administrative actions.

4. Any and all documents which detail, by year, funds expended on the drug testing programs listed above in 2(a)-2(h). This should include, but not necessarily be limited to, personnel costs, medical supplies and any other administrative expenses.

Note: This is intended to include City Council and should be construed to encompass all years and dates during which drug testing has been in effect.

You provided the requestor with a printout of drug testing results with the names and social security numbers of the persons tested redacted.¹ For each person tested, the printout contains a referral number, a collection date, a test type number, the name and social security number of the person tested, the department name, the department number code, the result (positive or negative) and, if positive, the kind of drug. You contend the city may withhold the names and social security numbers of the persons tested pursuant to former sections 3(a)(1) and 3(a)(2) of V.T.C.S. article 6252-17a, now sections 552.101 and 552.102 of the Government Code. Additionally, you also rely on former section 3(a)(11) of V.T.C.S. article 6252-17a, now section 552.111 of the Government Code, to withhold a draft report of drug testing statistics for 1989 through 1992.

Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

You contend the names and social security numbers of the subjects of the drug tests are confidential under the Medical Practice Act, V.T.C.S. article 4495b, and under the common-law right to privacy. Section 5.08(b) of the Medical Practice Act states as follows:

¹You redacted the name and social security number of each person because you contend that the names and social security numbers of those tested were not requested. By telephone, the requestor stated that he is seeking this information.

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Drug test results that were prepared by or under the supervision of a physician, are medical records within the provisions of section 5.08(b) of the Medical Practice Act. *See* Open Records Decision No. 594 (1991) at 3; *see also* Open Records Decision No. 324 (1982) (names and addresses of participants in lead blood test held confidential under Medical Practice Act). Section 5.08(h)(1) of the Medical Practice Act authorizes the release of a medical record to governmental agencies if the disclosure is required or authorized by law. Section 5.08(c) of the Medical Practice Act provides as follows:

Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Under this provision, with the exception of a person who obtains medical records on behalf of a patient pursuant to subsection (h) of section 5.08,² a person who obtains a confidential medical record may subsequently release "information from" that record only for a purpose that is consistent with the purpose for which the person originally obtained the record. *See* Open Records Decision No. 565 (1990) at 7. Based on your description, it appears that the city's drug program is supervised by a physician. Thus, assuming that the names and social security numbers are from drug test results which were prepared by or under the supervision of a physician, section 5.08(c) prohibits a person who receives that information from disclosing it except for the purposes for which it was first obtained.³ We therefore conclude that pursuant to section 5.08(c) of the Medical Practice

²Subsection (h)(5) of section 5.08 of the Medical Practice Act provides an exception to the confidentiality of medical records when a person has the written consent for the release of the records by the patient or other person acting on the patient's behalf, as provided by subsection (j) of section 5.08. Subsection (h) does not apply in this case since the requestor is not acting on behalf of the subjects of the test. Nor have the test subjects consented to the release of the test results pursuant to subsection (j).

³*Cf.* Open Records Decision No. 314 (1982) at 3-4 (holding section 2(c) of V.T.C.S. article 5561h prohibits school district from releasing teacher's confidential psychiatric evaluation received from a "professional," except for the authorized purposes for which the information was first obtained); *see also* Open Records Decision No. 565 (1990) (finding that the result in Open Records Decision No. 565 as to the limited release of the information to the teacher subject to the evaluation was changed by the addition of section 3B to the Open Records Act).

Act, and section 552.101 of the Government Code, you must withhold the names and social security numbers of the subjects of the drug tests. *See* Open Records Decision No. 507 (1988) at 5 (construing predecessor provision).⁴

Section 552.111 excepts from required public disclosure

[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

The Third Court of Appeals recently addressed the proper scope and interpretation of this exception. *See Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). As a consequence of this decision, this office reexamined its past rulings construing this section. *See* Open Records Decision No. 615 (1993) (copy enclosed). Open Records Decision No. 615 concluded that section 3(a)(11) excepts from required public disclosure only those internal agency memoranda consisting of advice, recommendations, and opinions that pertain to the policymaking functions of the governmental body at issue. In addition, this exception does not apply to purely factual information. *Id.* at 5.

You submitted "Exhibit C," which consists of a "Drug Testing Statistics CY92 Draft Report" with a cover letter from Alice C. Perrenot and an addendum to the draft report with a cover letter from Alice C. Perrenot. You say that the "draft report. . . contains the mental impressions and policy decisions of the people who prepared it." You also say that it "is not in final form" and "it would be misleading and inaccurate to release it at this time." However, we find no information in the report or its addendum which contains advice, recommendations, or opinions pertaining to the drug testing program. The report is a summary of statistics regarding the city's drug testing program. It contains the number and percentage of employees and applicants who tested positive by test type and by department for calendar years 1989 through 1992. These computations are purely factual. Similarly, the cover letters, which contain information about the drug testing statistical reports, are factual. Moreover, this drug testing information does not pertain to the policymaking of the city. We therefore conclude that you may not withhold the information in "Exhibit C" under section 552.111 of the Open Records Act. *See id.* As you raise no other exception to the release of this information, it must be released immediately.⁵

⁴We do not address whether the release of other information on the statistical reports which may have been taken from the drug test results violates the Medical Practice Act.

⁵*See* Open Records Decision No. 594 (1991) (holding section 3(a)(1) does not except from required public disclosure certain drug testing information of the City of Odessa, including total number of drug tests administered for a certain time period, total number of tests with positive results, total number and names of employees terminated for a certain time period, and budget expenditures for drug testing for a certain time period).

Finally, we note that one of the cover letters contains information about the cost of administering each test for calendar year 1992. You did not raise any exceptions to the release of information responsive to request item 4, pertaining to funds expended on the drug testing program. We therefore assume that information about the cost of the drug testing programs for other years will be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a long horizontal flourish extending to the right.

Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 22020

Enclosure: Open Records Decision No. 615

cc: Mr. Jay D. Root
The Houston Post
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(w/o enclosures)